Argued Feb. 3 & 5th 1908

Jan 17 - Postponed till Jan 20 next

Feb 24 Reargued

SUPREME COURT OF THE UNITED STATES.

No. 311. & No 312. Argued together

THE UNITED STATES, PLAINTIFF IN ERROR,

No 311 vs.

ROBERT L. CUTTING, ROBERT L. CUTTING, JR., AND JAMES D. W. CUTTING.

No. 312 - U.S. v. Cutting & Hatch

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

No. 311.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

ROBERT L. CUTTING, ROBERT L. CUTTING, JR., AND JAMES D. W. CUTTING.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court, before you, or some of you, between the United States of America, plaintiffs, and Robert L. Cutting, Robert L. Cutting, junior, and James D. W. Cutting, defendants, a manifest error hath happened, to the great damage of the said the United States of America, as is said and as appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this first Monday of December, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-ninth.

[SEAL.] KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The above writ allowed.
New York, October 18, 1865.

SAM'L R. BETTS.

2 U. S. circuit court.

THE UNITED STATES, pl'ff in error,
vs.
ROBERT L. CUTTING *and als.*, def'ts in error.

By virtue of the within writ of error and in obedience thereto, I, Kenneth G. White, clerk of the circuit court of the United States for the southern district of New York, do hereby certify and return the judgment and proceedings in the case in the writ within mentioned, and that the following pages, numbered from 1 to 9, inclusive, contain a true and complete transcript of the record and proceedings had in the said court in the above case, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district

of New York, in the second circuit, this 27th day of November, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the said United States the ninetieth.

[L. S.] KENNETH G. WHITE, *Clerk.*

Filed Oct. 18, '65.

3 U. S. circuit court for the southern district of New York.

Pleas before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, of the term of April, to wit, of the 2d day of October, in the year of our Lord one thousand eight hundred and sixty-five.

Witness the honorable Samuel Nelson, one of the judges of the said circuit court.

KENNETH G. WHITE, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the 26th day of September, 1865, in this same term, April, 1865, before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, came the United States of America, by D. S. Dickinson, their attorney, and brought into the said court, before the aforesaid judges thereof, then there, their certain declaration against Robert L. Cutting, Robert L. Cutting, jr., and James D. W. Cutting, being in custody, &c., of a plea of trespass on the case upon promises, which said declaration follows in these words, that is to say:

4 SOUTHERN DISTRICT OF NEW YORK, *ss:*

The United States of America, plaintiffs in this suit, by D. S. Dickinson, their district attorney for the said southern district, complain of Robert L. Cutting, Robert L. Cutting, junior, and James D. W. Cutting, defendants in this suit, being in custody, &c., of a plea of trespass on the case upon promises: For that whereas, heretofore, to wit, on or about the first day of May, 1865, at the city of New York, in the said southern district, the said defendants then and there being, and during the month of April then last past, having been copartners, doing business as brokers, under the firm, name, and style of R. L. Cutting & Co., and then and there and during the month of April then last past having been licensed to do such business under the provisions of the internal revenue laws of the United States, became and were indebted to these plaintiffs in the sum of one thousand dollars, under and by virtue of the provisions of section 99 of the act of Congress approved June 30, 1864, entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," as the same was amended by the act of Congress approved March 3d, 1865, for the duties or taxes imposed by said section upon sales and contracts

for sales of foreign exchange, promissory notes, gold and silver
5 bullion and coin, and government and other stocks, bonds, and securities made by them, the said defendants, during the month of April, 1865, at the city aforesaid, they, the said defendants, then and there being the owners of such foreign exchange, promissory notes, gold and silver bullion and coin, and government and other stocks, bonds, and securities, and making such sales upon their own account and for themselves, and not for others or for a commission; and being so indebted, they, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of one thousand dollars above mentioned, when they, the said defendants, should be thereunto afterwards requested; nevertheless the said defendants, although often afterwards requested so to do, have not as yet paid the said sum of money above mentioned, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof, to the said plaintiffs, the said defendants have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of the said plaintiffs of one thousand dollars, and therefore the said plaintiffs bring suit, &c.

6 And now at this day, that is to say, on the first Monday of October, 1865, in this same term of April, until which day the said defendants had leave to imparl to the said declaration, and then to answer the same, &c., before the said judges of the said circuit court, at the court buildings aforesaid, come as well the said plaintiffs, by their attorney aforesaid, as the said defendants, by William F. Allen, their attorney; and the said defendants defend the wrong and injury, when, &c., and say that they did not undertake or promise, in manner and form as the said plaintiffs have above thereof complained against them; and of this they put themselves upon the country, and the said plaintiffs do the like.

Therefore the issue above joined is ordered by the said circuit court to be tried on the 10th day of October, in this same term, held at the United States court buildings, in the city of New York, at which day and place last above mentioned, before the honorable Samuel Nelson, one of the judges of the said circuit court, according to the form of the statute in such case made and provided, come as well the above-named plaintiffs as the above-named defendants, by their respective attorneys above mentioned, and the jurors of the jury sum-
7 moned to try the said issue being called, also come; who, to speak the truth of the matters aforesaid being chosen, tried, and sworn, say upon their oath that the said defendants did not undertake or promise in manner and form as the said plaintiffs have above complained against them.

Therefore it is considered that the said plaintiffs take nothing by their said declaration, but that they be in mercy, &c., and that the said defendants do go thereof without day, &c.

Judgment signed this 12th day of October, 1865.

R. E. STILWELL, *Deputy Clerk.*

Indorsed: U. S. circuit court. Robert L. Cutting, Robert L. Cutting, jr., and James D. W. Cutting, *ads.* The United States. Judgment record. Wm. F. Allen, def'ts' att'y. Filed Oct. 12, 1865.

8 U. S. circuit court.

THE UNITED STATES OF AMERICA
vs.
ROBERT L. CUTTING, ROBERT L. CUTTING, jr., and James D. W. Cutting.

Which said issue, in form aforesaid, joined between the parties aforesaid, afterwards, to wit, at a circuit court of the United States of America, held at the United States court buildings in the city of New York, in and for the southern district of New York, in the second circuit, on the 10th day of October, 1865, before the honorable Samuel Nelson, one of the judges of the said circuit court, according to the form of the statute in such case made and provided, came on to be tried by a jury of the said southern district of New York, for that purpose duly empannelled, good and lawful men of the city and county of New York in said district, at which day came there as well the said plaintiffs as the said defendants, by their respective attorneys aforesaid; and the jurors of the jury aforesaid empanelled to try the said issue, being called, also came, and were then and there, in due manner, chosen and sworn to try the same issue.

And upon the trial of that issue, the counsel learned in the
9 law for the said the United States of America, to maintain and prove the said issue on their part, gave in evidence that on the first day of May, 1865, at the city of New York, in the southern district of New York, the said defendants were, and during the month of April then last past had been, copartners, doing business as brokers, under the firm, name and style of R. L. Cutting & Co.; that the said defendants then and there were, and during the month of April then last past had been, licensed to do such business under and in pursuance of the provisions of the act of Congress approved June 30, 1864, entitled "An act to provide internal revenue to support the government, to pay interest on the public debt and for other purposes, as the same was amended by the act of Congress approved March 3, 1865; that the defendants, during the said month of April, did as brokers, and acting for others, and for a commission, negotiate and make purchases and sales of stocks, bonds and securities, and made a report of the sales so made by them to the assessor of the proper district, and are charged with the duties thereon as prescribed and imposed by the said 99th section of said act. The right of the plaintiffs to those duties was not disputed, the plaintiffs not seeking to recover the same in this action; that said defendants during the same month of April were dealers in stocks, bonds and other securi-
10 ties of the character mentioned in the said 99th section, and sold the same on their own account, and as such dealers and not for a commission; that during the said month of April the said defendants made sales of foreign exchange promissory notes and gov-

ernment and other stocks, bonds and securities, they, the said defendants, then and there being the owners of such foreign exchange, promissory notes, and government and other stocks, bonds and securities, and making such sales upon their own account, and for themselves and not for others, or for a commission; and that the duties upon such sales will, if the same are subject to the duties imposed by the 99th section of the aforesaid act of Congress approved June 30, 1864, as the same was amended by the act of Congress approved March 3, 1865, and at the rates therein prescribed, amount to the sum of one thousand dollars; and thereupon the counsel learned in the law for the said defendants gave no evidence to maintain and prove the said issue on their part; whereupon the said counsel for the said plaintiffs did then and there, on behalf of the said plaintiffs, insist before the said judge of the said circuit court that the said matters, so produced and given in evidence on the part of the said
11 plaintiffs as aforesaid, were sufficient and ought to be admitted and allowed as decisive evidence, to entitle the said plaintiffs to a verdict on the said issue between them and the said defendants so joined as aforesaid; and the said counsel for the said plaintiffs did then and there pray the said judge of the said circuit court to admit and allow the said matters so produced and given in evidence for the said plaintiffs to be conclusive in favor of the said plaintiffs to entitle them to a verdict in this cause; but to this the counsel for the said defendants did then and there object, and did insist before the said judge of the said circuit court that the same matters so given in evidence on the part of the said plaintiffs were not sufficient, and ought not to be admitted or allowed to entitle the said plaintiffs to a verdict; and the said judge of the said circuit court did then and there declare and deliver his opinion to the jury aforesaid, that the several matters so produced and given in evidence on the part of the said plaintiffs were not sufficient to entitle them to a verdict in this cause; whereupon the said counsel for the said plaintiffs did then and there, on behalf of the said plaintiffs, except to the aforesaid opinion and decision of the said judge of the said circuit court, and insisted on the said several matters as sufficient to sustain the said action
12 on the part of the said plaintiffs and to entitle them to a verdict.

And the said judge of the said circuit court did also, then and there, further declare and deliver his opinion to the said jury, that the said defendants were not liable to pay the duties and rates of duty prescribed by the 99th section of the aforementioned act of Congress as amended by the act of Congress approved March 3, 1865, upon sales of foreign exchange, promissory notes, and government and other stocks, bonds and securities, owned and held by them in their own right, and sold on their own account and for themselves and not for others or for a commission; to which last mentioned opinion of the said judge of the said circuit court the said counsel for the said plaintiffs did then and there, on behalf of the said plaintiffs, duly except; and the said judge of the said circuit court, under the charge, and with the directions aforesaid, left the aforesaid issue and the evidence given on the trial thereof, as aforesaid, to the said jury;

and the jury aforesaid, then and there, gave their verdict for the said defendants; and inasmuch as the said several matters, so produced and given in evidence on the part of the said plaintiffs, and by their counsel aforesaid, objected, and insisted on, as sufficient to sustain the said action, and entitle the said plaintiffs to a verdict, do
13 not appear by the record of the verdict aforesaid, the said counsel for the said plaintiffs did then and there propose their aforesaid exceptions to the opinion of the said judge of the said circuit court, and requested him to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence on the part of the said plaintiffs as aforesaid, according to the form of the statute in such case made and provided; and thereupon the said judge of the said circuit court, at the request of the said counsel for the said plaintiffs did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, on the sixth day of November, in the year of our Lord, eighteen hundred and sixty-five.

S. NELSON. [SEAL.]

Indorsed: U. S. circuit court. The United States *vs.* Robert L. Cutting, Robert L. Cutting, junior, and James D. W. Cutting. Bill of exceptions. D. S. Dickinson, U. S. dist. att'y.
Filed Nov. 6, 1865.

14 Supreme Court of the United States, of December term, in the year of our Lord one thousand eight hundred and sixty-five.

THE UNITED STATES OF AMERICA, plaintiff in error,
vs.
ROBERT L. CUTTING, ROBERT L. CUTTING, junior, and JAMES D. W. CUTTING, defendants in error.

Afterwards, to wit, on the first Monday of December, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the said the United States of America, by D. S. Dickinson, their district attorney for the southern district of New York, and say that in the record and proceedings aforesaid there is manifest error in this, to wit: that by the record aforesaid it appears that the judgment aforesaid given was given for the said Robert L. Cutting, Robert L. Cutting, junior, and James D. W. Cutting, against the said the United States of America, whereas, by the law of the land, the said judgment ought to have been given for the said the United States of America,
15 against the said Robert L. Cutting, Robert L. Cutting, junior, and James D. W. Cutting; and the said the United States of America pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the said judgment, &c.

D. S. DICKINSON,
U. S. Dist. Att'y, Southern Dist. N. Y.,
And attorney for pl'ff in error.

Endorsed: U. S. Supreme Court. The United States, plaintiff in error, *vs.* Robert L. Cutting, Robert L. Cutting, junior, and James D. W. Cutting, defendants in error. Assignment of errors. D. S. Dickinson, U. S. dist. att'y and att'y for pl'ff in error.
Filed Nov. 16, 1865.

16 Supreme Court of the United States.

ROBERT L. CUTTING, ROBERT L. CUTTING, junior, and James D. W. Cutting, defendants in error, *ads.* THE UNITED STATES OF AMERICA, plaintiffs in error.

And afterwards, to wit, on the first Monday of December, in December term, in the year of our Lord one thousand eight hundred and sixty-five, the said Robert L. Cutting, Robert L. Cutting, junior, and James D. W. Cutting, by Elbridge T. Gerry, their attorney, freely come here into court and say that there is no error either in the record and proceedings aforesaid, or in the giving of the judgment aforesaid; and he prays that the said Supreme Court of judicature before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed.

ELBRIDGE T. GERRY,
Att'y for defendants in error, 54 Wall street, New York.

17 Endorsed: U. S. Supreme Court. Robert L. Cutting and al., def'ts in error, *ads.* The United States, pl'ff in error. Joinder in error. Elbridge T. Gerry, att'y for def'ts in error.
Filed Nov. 24, '65.

18 By the honorable Samuel R. Betts, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To Robert L. Cutting, Robert L. Cutting, junior, and James D. W. Cutting.

Whereas the United States of America lately issued out of the Supreme Court of the United States a writ of error, directed to the judges of the circuit court of the United States for the southern district of New York, in the second circuit, stating that in the record and proceedings, as also in the rendition of the judgment, of a plea in the said court before the judge thereof, between the United States of America, plaintiffs, and Robert L. Cutting, Robert L. Cutting, junior, and James D. W. Cutting, defendants, a manifest error hath happened, to the great damage of the said the United States of America; and whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated term of the Supreme Court of the United States, to be held at the Capitol, in the city of Washington, on the first Monday of December next: You are, there-

fore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the said first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the 18th day of October, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the United States the ninetieth.

SAM'L R. BETTS,
Judge of the United States for Southern Dist. New York.

19 Indorsed: U. S. Supreme Court. The United States, plaintiff in error, *vs.* Robert L. Cutting and others, defendants in error. Citation.

Service of the within citation and receipt of a copy thereof is hereby admitted this 19th day of October, 1865.

W. F. ALLEN, *Att'y for Def'ts.*

Filed Oct. 19, 1865.

Record filed in Supreme Court December 1, 1865.